Employers Resource *and* Talina Torres. Case 31–CA–097189

December 17, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On May 18, 2015 Administrative Law Judge Jeffrey D. Wedekind issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decisions in *D. R. Horton*, *Inc.,* 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part No. 14-60800, 2015 WL 6457613, ___ F.3d. ___ (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an arbitration provision that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

The Board has considered the decision and the record in light of the exceptions and briefs[1] and, based on the judge's application of *D. R. Horton* and *Murphy Oil*, supra, we affirm the judge's rulings, findings[2] and conclusions, and adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Employers Resource, San Marcos and

[1] We deny the Respondent's request for oral argument as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[2] We disagree with our dissenting colleague's argument that mandatory arbitration agreements do not violate the Act for the reasons stated in *Murphy Oil*, 361 NLRB No. 72, slip op. at 1–21.

The Respondent argues that the complaint is time barred by Sec. 10 (b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party, Talina Torres, signed and became subject to the arbitration provision. We reject this argument, as did the judge, because the Respondent continued to maintain the unlawful arbitration provision during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's arbitration provision, constitutes a continuing violation that is not time barred by Sec. 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, *Inc.,* 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the arbitration provision here, independently violates Sec. 8(a)(1). See *Murphy Oil*, supra at 19–21. The Respondent enforced its arbitration provision on January 8, 2013, within the relevant 6-month period before the charge was filed.

To the extent the Respondent argues that Torres was not engaged in concerted activity in filing a class action wage and hour lawsuit in Los Angeles Superior Court, we reject that argument. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also *D. R. Horton*, 357 NLRB No. 184, slip op. at 3.

We reject the Respondent's argument that because Torres was no longer an employee at the time she filed her charge, the complaint based on her charge should be dismissed. The Board has long held that the broad definition of "employee" contained in Sec. 2(3) of the Act covers former employees. See *Briggs Mfg. Co*., 75 NLRB 569, 571 (1947). Accord: *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, slip op. at 1 fn. 2 (2015); *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 3 fn. 9. Moreover, Sec. 102.9 of the Board's Rules and Regulations provides that a charge may be filed by "any person," without regard to whether that person is a 2(3) employee.

The Respondent's claim that the arbitration provision is lawful because it does not expressly bar class or collective arbitration fails under our decision in *Countrywide Financial Corp.,* 362 NLRB No. 165 (2015). In *Countrywide*, the arbitration agreement at issue was also silent with respect to prohibition of class or collective claims. The Board found that the employers' filing in Federal district court a motion to compel individual arbitration constituted unlawful enforcement of the arbitration agreement and "completely den[ied] employees their Section 7 right of access to all other forums where they could seek to litigate their employment claims collectively." Id. Likewise, here, the Respondent responded to Torres' State class action suit by filing a motion to compel individual arbitration, arguing that the court must enforce the arbitration agreement by its express terms and not impose any class arbitration "which was never agreed to by the parties." Consistent with our decision in *Countrywide*, supra, we find that the Respondent's filing of the motion to compel effectively denied Torres her Sec. 7 right to all other forums where she could seek to litigate her collective claims, and that such conduct is precisely what the Board enjoined in *D.R. Horton* and *Murphy Oil*. See also *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (a rule that does not expressly restrict protected activity is nevertheless unlawful if it has been applied to restrict protected activity).

We likewise reject, for the reasons stated by the judge, the Respondent's remaining arguments. Specifically, we finding lacking in merit its contentions that *D.R. Horton* and *Murphy Oil* are distinguishable from this case because: (1) the Respondent was not Torres's common-law employer; (2) the arbitration provision was not a mandatory condition of employment; (3) it did not maintain the arbitration agreement; and (4) Torres is not precluded from pursuing a collective action in State court against her former employer, Beth's Kitchen, Inc.

[3] We shall modify the judge's recommended Order to conform to the Board's standard remedial language, including the requirements that the Respondent post a remedial notice at its own facility and distribute it electronically if it customarily communicates with employees in that manner. See *Dr. Pepper Snapple Group*, 357 NLRB No. 167 (2011). We shall substitute a new notice to conform to the Order as modified.

Tustin, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration provision that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration provision in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration provision does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration provision in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised provision.

(c) Notify the Superior Court of the State of California, County of Los Angeles, in LASC Case BC488455 that it has rescinded or revised the mandatory arbitration provision upon which it based its motion to stay Talina Torres' collective lawsuit and to compel individual arbitration of her claim, and inform the court that it no longer opposes the lawsuit on the basis of the arbitration provision.

(d) In the manner set forth in the judge's decision, reimburse Talina Torres for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's motion to stay the collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense, the attached notice marked "Appendix" to all current and former employees who have been covered by its employment agreement and performed work for its clients at any time since January 8, 2013.

(f) Within 14 days after service by the Region, post at its facilities in San Marcos and Tustin, California, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Region, after being signed by the Respondent's authorized representative, shall be posted and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 17, 2015

_____

Mark Gaston Pearce, Chairman

_____

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Employment Agreement (the Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or the NLRA) because the Respondent has applied it to require individual arbitration of non-NLRA employment claims.[1] Talina Torres signed the Agreement, and later she filed a class-action lawsuit against the Respondent and Beth's Kitchen, Inc. in State court alleging California labor law violations. In reliance on the Agreement, the Respondent filed a Notice of Motion and Motion to Compel Individual Arbitration, Strike Class Allegations, and Stay or Dismiss Proceedings (Motion to Compel).[2] My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from

[4] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] The Agreement requires that non-NLRA employment claims be resolved through arbitration, but it does not expressly prohibit class or collective arbitration.

[2] The Respondent provided payroll and other personnel services to Beth's Kitchen, where Torres was employed as a server. The court granted the Respondent's motion as to Torres' claims against the Respondent, but denied it as to her claims against Beth's Kitchen.

these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[3]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than the NLRA.[4] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, the NLRA, Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[5] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[6] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[7] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[8] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in State court seeking to enforce the Agreement.[9] It is relevant that the

[3] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, 2015 WL 6457613 (5th Cir. 2015).

[4] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of the NLRA, Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Here, Torres filed the lawsuit by herself, and there is no evidence that she ever sought the support of any other employee. Accordingly, the record fails to establish that Torres engaged in protected concerted activity. See *Beyoglu*, above (Member Miscimarra, dissenting) (finding that employee's individual act of filing a collective action was not concerted activity).

[5] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[6] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[7] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, 96 F.Supp., 3d 71 2015 WL 1433219 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.,* 99 F.Supp.3d 1072 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services,* No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[8] For the reasons expressed in my *Murphy Oil* partial dissent, and those thoroughly explained in former Member Johnson's partial dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[9] The Agreement was silent as to whether arbitration may be conducted on a class or collective basis. In finding the Respondent's Motion to Compel Individual Arbitration unlawful, my colleagues rely on *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015). In *Countrywide Financial*, a Board majority decided that the employer violated the Act by moving to compel individual arbitration based on an arbitration agreement that, like the Respondent's, was silent regarding the arbitrability of class and collective claims. For the reasons stated in Member Johnson's dissent in *Countrywide Financial*, however, id., slip

State court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by the multitude of court decisions that have enforced similar agreements.[10] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[11] I also believe that any Board finding of a violation based on the Respondent's meritorious State court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party for its attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. December 17, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

op. at 8–10, the Board's decision in that case is in conflict with the FAA and Supreme Court precedent construing that statute. The Court has held that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662, 684–685 (2010) (emphasis in original). Obviously, where an arbitration agreement is silent regarding class arbitration, there is no such contractual basis. Thus, the Respondent's motion to compel individual arbitration was "firmly grounded in the Supreme Court's FAA jurisprudence." Id., slip op. at 9 (Member Johnson, dissenting).

[10] See, e.g., *Murphy Oil USA, Inc. v. NLRB,* above; *Johnmohammadi v. Bloomingdale's, Inc.,* 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013).

[11] *Murphy Oil USA, Inc. v. NLRB,* above, at fn 3.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration provision that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration provision in all of its forms, or revise it in all of its forms to make clear that the arbitration provision does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all applicants and current and former employees who were required to sign or otherwise become bound to the mandatory arbitration provision in all of its forms that the arbitration provision has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised provision.

WE WILL notify the court in which Talina Torres filed her collective lawsuit that we have rescinded or revised the mandatory arbitration provision upon which we based our motion to dismiss her collective lawsuit and compel individual arbitration, and WE WILL inform the court that we no longer oppose Talina Torres 'collective lawsuit on the basis of that provision.

WE WILL reimburse Talina Torres for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to dismiss her collective lawsuit and compel individual arbitration.

EMPLOYERS RESOURCE

The Board's decision can be found at www.nlrb.gov/case/31-CA-097189 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Amanda W. Dixon, Esq., for the General Counsel.
Jennifer L. Santa Maria, Esq. (Ogletree, Deakins, Nash, Smoak & Steward, P.C), for the Respondent.
Shayna E. Dickstein, Esq. (Matern Law Group), for the Charging Party.

DECISION

STATEMENT OF THE CASE

JEFFREY D. WEDEKIND, Administrative Law Judge. This is another case involving an alleged unlawful mandatory arbitration clause. The Charging Party is Talina Torres, who was employed as a server by Beth's Kitchen, Inc. (BK) from September 2009 until she was laid off for lack of work in June 2011, and who subsequently filed a wage and hour suit in California superior court "on behalf of herself and all other persons similarly situated" in July 2012. The Respondent is Employers Resource (ER), a self-described "professional employer organization" (PEO) that provided payroll and other personnel services to BK and other employers during the relevant period, and was named along with BK as a defendant in Torres' class action suit.[1]

The subject mandatory arbitration clause is contained in the standard "Employment Agreement" that ER provided to BK and other California clients to use in hiring new employees.

The provision is silent about whether such wage and hour claims could be arbitrated on a collective or class basis.[2] Nevertheless, it is undisputed that, on January 8, 2013, ER moved the State court to compel individual arbitration of Torres' class-action suit against it pursuant to that provision, citing the Supreme Court's holding in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 559 U.S. 662 (2010), that an implicit agreement to authorize class arbitration may not be inferred from the contract's silence on the matter.

The instant complaint alleges that, by filing the foregoing motion (which the court granted), ER unlawfully maintained and enforced the mandatory arbitration provision to restrict the right of employees under the National Labor Relations Act to engage in concerted legal action. In support, the General Counsel cites the Board's recent decision in *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014). The Board in that case reaffirmed its prior decision in *D. R. Horton, Inc*., 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and held that the respondent employer violated Section 8(a)(1) of the Act by requiring its employees to sign an agreement, as a condition of employment, that expressly barred them from pursuing collective or class claims either in court or in arbitration, and by seeking to enforce that agreement in court by moving to compel individual arbitration of the employees' pending collective and class wage and hour claims.

ER contends that the Board lacks jurisdiction over the matter because BK was Torres "true employer" and because Torres was no longer an "employee" within the meaning of the Act at the time she filed her lawsuit.[3] Alternatively, ER argues that the allegations are without merit because, unlike in *Murphy Oil* and *D. R. Horton*, Torres and other employees were not required to sign the employment agreement as a condition of employment, the arbitration provision does not expressly bar class or collective arbitration, and Torres filed her lawsuit by herself, without the support or authorization of any other em-

[1] BK and its alleged successor in interest Freshlunches, Inc. were also named respondents in the original complaint that issued in this matter on January 30, 2014 (GC Exh. 1(j)). However, the allegations against BK and Freshlunches were subsequently settled (GC Exh. 1(q); Tr. 14). Accordingly, the amended complaint names only ER as a respondent (GC Exh. 1(aa)).

[2] In relevant part, the arbitration provision states:

> Employee agrees that any claim, dispute and/or controversy (including, but not limited to any claims of discrimination and harassment) that either Employee or Employers Resource (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) may have against the other, or which Employee would have against the Worksite Employer (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) which would otherwise require or allow resort to any court or other governmental dispute resolution forum arising from, related to, or having any relationship or connection whatsoever with Employers Resource and/or the Worksite Employer, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act . . . . [Jt. Exh. 5.]

[3] ER does not dispute, and the record establishes, that the Board's commerce standards for asserting jurisdiction are satisfied. See Tr. 58. Although ER contends that the underlying unfair labor practice charge was untimely filed by Torres more than 6 months after she signed the employment agreement, the contention is without merit. It is well established that an 8(a)(1) violation may be found when an unlawful rule or policy is maintained or enforced within 6 months of the charge, regardless of when the rule or policy became effective. See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 (2015), and cases cited there. Here, the original charge was filed and served on ER on January 24 and 29, 2013, respectively (GC Exh. 1(g), (i)), less than a month after ER filed the alleged unlawful motion to compel individual arbitration.

ployees, and was therefore not engaged in protected "concerted" activity under the Act.[4]

A hearing to address the foregoing issues was held on April 6 in Los Angeles. Thereafter, on May 11, the General Counsel, Charging Party Torres, and Respondent ER filed posthearing briefs.[5] After carefully considering those briefs and the entire record, for the reasons set forth below, I find that ER violated the Act as alleged.

I. WHETHER ER IS AN "EMPLOYER" LIABLE UNDER THE ACT

The record supports ER's contention that BK was Torres' primary or worksite employer. Although the employment agreement stated that ER was a party to the agreement and that Torres was a "co-employee" of both BK and ER,[6] BK alone interviewed, hired, trained, scheduled, and supervised Torres, and determined her wages and benefits (GC Exh. 2; Tr. 25–27, 31–32, 55–56). Indeed, there is no evidence that Torres ever had any direct contact with any ER personnel.

However, the General Counsel's theory of violation does not turn on whether or to what extent ER was an employer of Torres. Indeed, the General Counsel made clear at the hearing that this is not the theory. Rather, the General Counsel's theory is that ER is liable under the Act because it is an employer engaged in commerce generally and because of its particular actions with respect to the mandatory arbitration employment agreement—specifically, preparing the agreement and providing it to BK, making itself a party to the agreement, and asserting to the State court that the agreement barred class or collective arbitration of Torres' wage and hour claims against it. (See Tr. 12–13, 27–31, 43; and GC Br. at 11–15.)[7]

The General Counsel's theory is well supported by Board and court precedent. See *New York New York Hotel & Casino*, 356 NLRB No. 119, slip op. at 6–7 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), cert. denied 133 S.Ct. 1580 (2013), and cases cited there (holding, in a wide variety of circumstances, that an employer may properly be held accountable for restricting or interfering with the protected rights of employees regardless of whether it is an employer of those employees). Contrary to ER's contention, there is no rational basis to conclude that this precedent is inapplicable to the particular circumstances here. Accordingly, I find that ER is properly named as a respondent employer in the complaint.

II. WHETHER TORRES IS AN "EMPLOYEE" COVERED BY THE ACT

ER contends that Torres is not an "employee" covered by the Act because she was not terminated by BK "as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice," as provided in Section 2(3) of the Act. However, Section 2(3) of the Act does not state that former employees of an employer are only covered by the Act in such circumstances. Further, it states that the term "employee" shall include "any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise."[8] The Board has therefore interpreted the term broadly to encompass members of the working class generally, including individuals in circumstances similar to those here. See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 fn. 3 & JD. at 6–7 (2015) (finding that the charging party was an "employee" notwithstanding that he filed his class action FLSA suit against the employer after being terminated for unrelated reasons). Accordingly, I find that Torres is an "employee" covered by the Act.

III. WHETHER THE EMPLOYMENT AGREEMENT WAS A CONDITION OF EMPLOYMENT

ER's chief operations officer, Keith Kuznitz, testified that ER's clients, including BK, were not required to use the employment agreement, and that BK's employees did not actually sign the employment agreement until after their employment commenced. However, the record as a whole clearly establishes otherwise. ER's "Client Service Agreement" with BK specifically stated that "no employee of [BK] will be covered by this Agreement, or will become a co-employee of [ER], until [BK] has completed and delivered to [ER], an enrollment packet for that individual." It also prohibited BK from altering the terms of the employment agreement without ER's written authorization. (GC Exh. 2, secs. 1, 8.b.) Further, it is undisputed that the employment agreement was included in the "New Employee Hiring Information Packet" ER provided to BK. Also included in the new-hire packet were a W-4 tax withholding form and an I-9 employment eligibility verification form. The cover page to the packet "instruct[ed]" the employee to "sign" the "employment agreement" and W-4 and I-9 forms "prior to starting work," and stated that the company would be "unable to process payroll unless these forms are properly completed."

[4] ER also argues that the Board's decisions in *Murphy Oil* and *D. R. Horton* are wrong. However, this is an argument for the Board and the reviewing courts to address. See *D. L. Baker, Inc*., 351 NLRB 515, 529 fn. 42 (2007); and *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

[5] In evaluating the issues presented in this case, I have not considered or relied on any of the nonrecord exhibits attached to the Charging Party's brief.

[6] Jt. Exh. 5. See also GC Exh. 3, Torres' June 15, 2011 termination notice, which states that she was being "terminated from . . . employment with Employers Resource" for lack of work.

[7] The General Counsel asserts (Br. 14) that ER was actually the *sole* party to the agreement with Torres. However, the first line of the agreement states that it "is entered into by and between the undersigned employee (Employee), Employers Resource, and the entity to whom Employee regularly reports (hereinafter the 'Worksite Employer')."

[8] In full, Sec. 2(3) states:

> The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act [45 U.S.C. § 151 et seq.], as amended from time to time, or by any other person who is not an employer as herein defined.

Consistent with these written instructions, Torres credibly testified that a BK manager told her she had to sign the documents, including the employment agreement, in order to get paid, and that she did, in fact, sign the employment agreement before she started working. (Jt. Exhs 1–5; Tr. 19–20, 23–24, 37.)[9] Accordingly, in agreement with the General Counsel, I find that, like the employees in *Murphy Oil* and *D.R. Horton*, Torres was required by ER and BK to sign the employment agreement containing the mandatory arbitration provision as a condition of employment.[10]

IV. WHETHER THE EMPLOYMENT AGREEMENT BARS CLASS OR COLLECTIVE ARBITRATION

As discussed above, unlike in *Murphy Oil* and *D.R. Horton*, the mandatory arbitration provision here does not expressly bar class or collective arbitration. However, ER argued in its successful January 2013 motion to the State court that, under *Stolt-Nielsen*, the provision implicitly or effectively does so. See Jt. Exhs. 8 and 10. Accordingly, in agreement with the General Counsel, I find that *Murphy Oil* and *D. R. Horton* are not materially distinguishable, and that the mandatory arbitration provision here likewise violates Section 8(a)(1) of the Act. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (a rule that does not expressly restrict protected activity is nevertheless unlawful if it has been applied to restrict protected activity); and *Chesapeake Energy Corp*., 362 NLRB No. 80 (2015) (*Lutheran Heritage* test is properly applied in evaluating whether an employer's mandatory arbitration policy unlawfully bars employees from pursuing employment-related claims on a class or collective basis in any forum).[11]

V. WHETHER TORRES' LAWSUIT CONSTITUTED PROTECTED CONCERTED ACTIVITY

As indicated above, ER also contends that Torres' class action wage and hour suit did not constitute "concerted activity" within the meaning of Section 7 of the Act because Torres was the sole named plaintiff and she admitted that she never discussed either the employment agreement or the lawsuit with her coworkers (Tr. 33–34). However, in *D. R. Horton*, the Board specifically held that "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." 357 NLRB No. 184, slip op. at 3. The Board subsequently reaffirmed this holding in *Murphy Oil*, rejecting the argument that such a lawsuit is not "concerted" within the meaning of the Act. 361 NLRB No. 72, slip op. at 12–13. I therefore likewise reject ER's argument here, and find that Torres' class action wage and hour suit constituted protected concerted activity. Accordingly, as ER's motion to the State court sought to restrict that activity, it violated Section 8(a)(1) of the Act. See also *Cellular Sales,* above (finding a similar violation on similar facts).

CONCLUSIONS OF LAW

1. ER is an "employer" within the meaning of Section 2(2), (6), and (7) of the Act.
2. Torres is an "employee" within the meaning of Section 2(3) of the Act.
3. By filing a motion in January 2013 to compel individual arbitration of Torres' State court class action wage and hour claims against it pursuant to its mandatory arbitration employment agreement with Torres, ER has maintained and enforced that agreement to restrict the right of employees under the Act to engage in protected concerted activities, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

The appropriate remedy for the violations found is an order requiring ER to cease and desist from its unlawful conduct and to take certain affirmative action to effectuate the policies of the Act. Specifically, ER must rescind or revise the mandatory arbitration employment agreement, notify Torres, other current and former employees who executed the agreement, and the State court that it has done so, and inform the State court that it no longer opposes Torres' class action wage and hour suit on the basis of the agreement. ER must also reimburse Torres for all reasonable expenses and legal fees incurred in opposing ER's unlawful January 8, 2013 motion to compel individual arbitration of her class action suit, with interest computed and compounded daily in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), and *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Murphy Oil* and *Cellular Sales*, above.[12]

[9] Torres' testimony was uncontroverted; no managers, supervisors, or other employees of BK were called to testify.

[10] In light of this finding (which is consistent with the State court's finding that the agreement was presented to Torres "on a take it or leave it basis," Jt. Exh. 10, p. 9, it is unnecessary to address the General Counsel's alternative argument that the mandatory arbitration provision violated Sec. 8(a)(1) even if Torres was not required to sign it as a condition of employment.

[11] Under *Lutheran Heritage*, a rule that does not expressly restrict protected activity may also be found unlawful if employees would reasonably construe it as restricting such activity. However, the General Counsel does not contend that employees would reasonably construe ER's mandatory arbitration provision to bar class or collective arbitration. Rather, the General Counsel contends that the mandatory arbitration provision is unlawful only because ER applied it to bar class or collective arbitration by filing a motion in State court to compel individual arbitration of Torres' claims against it. See GC Br. at 9–10.

As indicated by ER, the record indicates that Torres has not been precluded from litigating the classwide wage and hour claims against BK in court. However, the State court denied BK's motion to compel arbitration because it found that the mandatory arbitration provision was both procedurally and substantively unconscionable with respect to BK. Thus, the court did not reach whether the provision barred class or collective arbitration against BK. See Jt. Exh. 10, pp. 13–16. In any event, whether ER violated the Act as alleged turns on its own actions, not BK's actions or the State court's rulings.

[12] See also *Good Samaritan Medical Center*, 361 NLRB No. 145 (2014) (ordering rescission of a workplace civility policy that was

The appropriate remedy normally also includes a requirement that the respondent employer post a notice to employees at its facilities. However, as discussed above, the record indicates that the employees covered by ER's employment agreement do not work at ER's facilities, but at facilities owned and/or operated by ER's clients. Therefore, ER must instead duplicate and mail the notice to all employees who have been covered by its employment agreement and performed work for its clients at any time since January 8, 2013. See, e.g., *Dr. Pepper Snapple Group*, 357 NLRB No. 167, slip op. at 1 fn. 1 & JD fn. 28 (2011), and cases cited there.

Accordingly, based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Employers Resource, San Marcos and Tustin, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory arbitration employment agreement to require employees, as a condition of employment, to waive the right to pursue or maintain employment-related class or collective claims in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the mandatory arbitration employment agreement or revise it to make clear that the agreement does not constitute a waiver of the right to pursue or maintain employment-related class or collective actions in any forum.

(b) Notify Talina Torres and other current and former employees who signed the mandatory arbitration employment agreement that the agreement has been rescinded or revised and, if revised, provide them with a copy of the revised agreement.

(c) Notify the Superior Court of California, County of Los Angeles, LASC Case No. BC488455, that it has rescinded or revised the mandatory arbitration employment agreement upon which it based its January 8, 2013 motion to compel individual arbitration of Torres' class action wage and hour claims, and inform the court that it no longer opposes the class action on the basis of that agreement.

(d) Reimburse Torres for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing its motion to compel individual arbitration of her class action wage and hour claims against it.

(e) Within 14 days after service by the Region, duplicate and mail, at its own expense, the attached notice marked "Appendix" to all employees who have been covered by its employment agreement and performed work for its clients at any time since January 8, 2013.[14]

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 18, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce a mandatory arbitration employment agreement to require you, as a condition of employment, to waive the right to pursue or maintain employment-related class or collective claims in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind our mandatory arbitration employment agreement or revise it to make clear that the agreement does not constitute a waiver of the right to pursue or maintain employment-related class or collective claims in any forum.

WE WILL notify Talina Torres and all other current and former employees who signed our mandatory arbitration employment agreement that the agreement has been rescinded or revised and, if revised, provide them with a copy of the revised agreement.

WE WILL notify the Superior Court of California, County of Los Angeles, LASC Case No. BC488455, that we have rescinded or revised the mandatory arbitration employment agreement upon which we based our January 8, 2013 motion to compel individual arbitration of Torres' class action wage and

unlawful because it had been applied to restrict the exercise of Section 7 rights).

[13] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

hour claims against us, and inform the court that we no longer oppose the class action on the basis of that agreement.

WE WILL reimburse Torres for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to compel individual arbitration of her class action wage and hour claims against us.

EMPLOYERS RESOURCE